No. 83-2014

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In The

Supreme Court of the United States

October Term, 1983

GUIDO FREZZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN ROGERS CARROLL
THOMAS COLAS CARROLL
CARROLL & CARROLL
Attorneys for Petitioner
Suite 1206
615 Chestnut Street
Philadelphia, Pennsylvania 19106
(215) 925-4100

0477
Ivis Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTIONS PRESENTED FOR REVIEW

1. Do not the policies, considered in tandem, of *Gregg v. United States* (absolute prohibition on trial judge reading presentence report prior to verdict to prevent possible, not necessarily actual, prejudice) and 28 U.S.C. §455(a) (mandatory recusal where impartiality might reasonably be questioned) fairly require a *per se* rule of disqualification where a previously sentenced defendant is to be tried before the sentencing judge on a new indictment, as is the approach taken through local rules and decisional law of some circuits and district courts but not the Third Circuit which applies a balancing test?

2. Assuming *arguendo* that the "balancing test" is the proper approach, should not the trial judge in this multi-judge district have recused himself from petitioner's trial on a new indictment where no sound reason of judicial administration disfavored reassignment to another judge?

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No.

In The

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October Term, 1983

GUIDO FREZZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Guido Frezzo prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction entered against him following a jury verdict of guilty.

STATEMENT OF JURISDICTION

Petitioner Guido Frezzo seeks a writ of certiorari to review the judgment (Appendix A) rendered by the United States Court of Appeals for the Third Circuit on April 6, 1984. The judgment affirmed petitioner's criminal conviction entered in the United

States District Court for the Eastern District of Pennsylvania following a jury trial.

The Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. §1254(1). The petition is timely filed on June 5, 1984.

RELEVANT STATUTES AND RULES

28 U.S.C. §455(a) provides:

> §455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Federal Rule of Criminal Procedure 32(c) provides:

> (c) Presentence Investigation.
>
> (1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.
>
> The report shall not be submitted to the court or its contents disclosed to anyone unless the

> defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

STATEMENT OF THE CASE

A. Procedural History

On January 26, 1983 petitioner was indicted by a federal grand jury in the Eastern District of Pennsylvania and charged with violations of 18 U.S.C. §371 (conspiracy) and 18 U.S.C. §2315 (receiving stolen property which had been transported in interstate commerce).

At the time of petitioner's indictment there were over 15 active judges in the United States District Court for the Eastern District of Pennsylvania available to try criminal cases. In accordance with the Local Criminal Rule 3 (E.D. Pa.) petitioner's indictment was placed on the "wheel" for random assignment to one of the available judges. By happenstance, the indictment was assigned to the Honorable Raymond J. Broderick, who earlier had presided over a jury trial in which petitioner had been convicted on an unrelated indictment. Judge Broderick had examined a presentence report on petitioner and had sentenced him to a term of imprisonment on the earlier case.

Based on these circumstances, petitioner timely moved for disqualification. The trial judge refused to disqualify himself (Appendix B). Petitioner was ultimately convicted by a jury, sentenced to prison, and his conviction was affirmed on appeal to the United States Court of Appeals for the Third Circuit (Appendix A).

B. Concise Statement of Facts

Judge Broderick had presided over a 1978 prosecution of petitioner for violation of federal water pollution control statutes. A jury convicted petitioner and, after a presentence examination and submission of report to Judge Broderick, petitioner was sentenced to a term of imprisonment and a substantial fine. Even though the referenced prosecution had taken place five years before the new indictment (the new indictment was completely unrelated and was based upon petitioner's receipt of some stolen paintings) litigation with respect to the water pollution case was still in progress and petitioner had not yet begun to serve the jail sentence. Indeed, the water pollution case had become one of the most protracted criminal cases in the history of the United States District Court for the Eastern District of Pennsylvania and had involved continuing evidentiary hearings before Judge Broderick up to a point shortly before the return of the new indictment. *United States v. Guido Frezzo, et al.*, 461 F. Supp. 266 (E.D. Pa. 1978) (opinion denying post-trial motions), *aff'd*, 602 F. 2d 1123 (3rd Cir. 1979) (affirming conviction on direct appeal), *cert. denied*, 444 U.S. 1074 (1980) (certiorari denied on direct appeal), *collateral relief denied*, 491 F. Supp. 1339 (E.D. Pa. 1980) (§2255 and coram nobis petition denied), *rev'd*, 642 F. 2d 59 (3rd Cir. 1981) (collateral relief denial reversed and remanded for further proceedings), *collateral relief denied*, 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F. 2d 62 (3rd Cir. 1983) (affirmance of denial of collateral relief following remand), *cert. denied*, ____ U.S. ____ (1983).

Petitioner did not contend that he could demonstrate that Judge Broderick harbored any actual prejudice against him and did not move for disqualification on this basis. Rather, petitioner contended that the trial judge's exposure to the presentence report in the earlier cases, and attendant communication with the presentence investigator, and subsequent imposition of a sentence of imprisonment and substantial fine created a reasonable factual basis for questioning the impartiality of the trial judge based upon

the peculiar status of presentence reports which is recognized in F. R. Crim. P. 32(c) and the *Gregg* decision of this Court, *infra*. Petitioner also suggested that although the earlier sentencing had taken place five years before, the case was uniquely fresh in the trial judge's mind because of the protracted effort to overturn petitioner's earlier conviction and sentence which had resulted in very recent, extensive evidentiary hearings as to which the trial judge had denied relief as to which the Court of Appeals had reversed and remanded for yet further proceedings.

REASONS FOR GRANTING THE WRIT

Petitioner notes that Supreme Court Rule 17.1(a) suggests that the Court will consider a case for certiorari where a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. The present petition does not raise an issue as to which there is a split of the decisional authorities of the circuits. The issue here presented, however, is the subject of divergent approaches .aken by the circuits. The Seventh Circuit, by rule, effectively disqualifies a trial judge from presiding over a second trial involving the same defendant where the trial judge has presided over an earlier trial where the judgment is reversed on appeal. Seventh Circuit Rule 18; *United States v. Tranowski,* 702 F. 2d 688 (7th Cir. 1983). The Third Circuit, by decisional law, applies a "balancing test" in such circumstances. *United States v. Small,* 472 F. 2d 818 (3rd Cir. 1972). Petitioner suggests that under these circumstances this petition presents an issue which is similar to, although concededly not identical with, an issue as to which there is a split of decisional law among the circuits. Petitioner suggests that an important question of federal law and appropriate exercise of this Court's power of supervision is presented in this petition.

I.

The policies, considered in tandem, of *Gregg v. United States* (absolute prohibition on trial judge reading presentence report prior to verdict to prevent possible, not necessarily actual, prejudice) and 28 U.S.C. §455(a) (mandatory recusal where impartiality might reasonably be questioned) fairly require a *per se* rule of disqualification where a previously sentenced defendant is to be tried before the sentencing judge on a new indictment, as is the approach taken through local rules and decisional law of some circuits and district courts but not the Third Circuit which applies a "balancing test".

In *Gregg v. United States,* 394 U.S. 489 (1969), Mr. Justice White, writing for a unanimous Court, held that F.R. Crim P. 32(c) constitutes an absolute prohibition on a trial judge reading a presentence report prior to defendant's entry of a plea of guilty or jury verdict of guilty.

> Rule 32 is explicit. It asserts that the "report shall not be submitted to the Court . . . unless the defendant has pleaded guilty or has been found guilty". This language clearly permits the preparation of a presentence report before a guilty plea or conviction but it is equally clear that the report must not, under any circumstances, be "submitted to the Court" before the defendant pleads guilty or is convicted. Submission of the report to the Court before that point constitutes error of the clearest kind.
>
> Moreover, the rule must not be taken lightly. Presentence reports are documents which the Rule does not make available to the defendant as a matter of right. There are no formal limitations

> on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the ex parte introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the Rule's purpose of preventing possible prejudice for premature submission of the presentence report.

28 U.S.C. §455(a) provides:

> Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Left unanswered in *Gregg* was the question of whether a trial judge's exposure to a presentence report at the proper time, *i.e.*, after verdict and post-trial motions but before sentencing, requires disqualification of the judge from further proceedings involving the same defendant, *e.g.*, remand for retrial or, as here presented, a later, unrelated prosecution involving the same defendant.

The Third Circuit approach is set forth in *United States v. Small,* 472 F.2d 818, 822 (3rd Cir. 1972). In *Small* the Court of Appeals had granted a new trial and the issue presented was the propriety of the same judge presiding over the retrial where he had read the presentence report and sentenced the defendant following the first trial. *Small* suggests that where the trial judge has examined the presentence report for "legitimate purposes" a balancing test must be applied with respect to the propriety of the same judge presiding over a second trial. The possibility of prejudice must be weighed against administrative convenience. The court did not explicitly resolve the issue, noting that "the

complex nature of the values at stake merits consideration by the District Courts" and suggested that a body of law should develop in the District Courts of the Third Circuit before the Court of Appeals would consider adopting a supervisory rule. The affirmance of petitioner's conviction suggests that the Third Circuit now actually applies the *Small* test. (Appendix A).

The Seventh Circuit, the District of Connecticut and the Eastern District of New York have local rules that provide for reassignment of a controversy over which the judge has presided which has been reversed and remanded; the rules appear designed to eliminate even the appearance of possible prejudice. *See United States v. Hill,* 550 F. Supp. 983, fn. 6 (E.D. Pa. 1982). The Seventh Circuit's Local Rule 18 titled "Reassignment of Remanded Cases" reads:

> Whenever a case tried in the District Court is remanded by this court for a new trial, it shall be reassigned by the District Court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request the same judge retry the case. In appeals which are not subject to this rule by its term, this court may nevertheless direct, in its opinion or order, that this Rule shall apply on remand.

See United States v. Tranowski, 702 F.2d 669, 671 (7th Cir. 1983). Decisional law from other districts and circuits suggest that reassignment is the proper manner of satisfying the *Gregg* avoidance of appearance of prejudice concerns. *See Webster v. United States,* 330 F. Supp. 1080 (E.D. Vir. 1971); *United States v. Montecalvo,* 553 F.2d 1110 (9th Cir. 1976); *United States v. Park,* 521 F.2d 1381 (9th Cir. 1975); *United States v. Robin,* 553 F.2d 8 (2nd Cir. 1977).

The general post-*Gregg* view is that a balancing approach is appropriate, with the defendant effectively bearing a burden to demonstrate actual prejudice. *See e.g., United States v. Clark,* 605 F.2d 939, 940-41 (5th Cir. 1979); *United States v. Lyon,* 588 F.2d 581, 582-83 (8th Cir. 1978), *cert. denied,* 441 U.S. 910 (1979).

The demonstration of actual prejudice is not consistent, in petitioner's view, with 28 U.S.C. §455(a) which makes disqualification mandatory where the impartiality of the trial judge might reasonably be questioned. In *United States v. Noble,* 696 F.2d 231, 235 (3rd Cir. 1981), the court commented on the policy behind §455(a):

> Congress designed this general standard [i.e. §455(a)] "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case . . . the focus under the statute is on the objective appearance of bias, rather than bias-in-fact."

It is true that the *Gregg* decision, narrowly read, is a construction of F. R. Crim. P. 32 which "is explicit" and pre-verdict submission "constitutes error of the clearest kind", 394 U.S. at 491-92. But Mr. Justice White's language in *Gregg* leaves little room for the suggestion that a violation of Rule 32 could be deemed harmless error where a defendant is unable to demonstrate actual prejudice. Rather, the opinion of the court, fairly read, suggests that presentence reports occupy a special role in criminal cases and in dealing with the implications of a trial judge reading the presentence report one should consider not merely Rule 32 but also the purpose behind Rule 32. That purpose is characterized by the Court as "preventing possible prejudice

from premature submission of the presentence report", 394 U.S. 492. Thus, it is possible prejudice, not the showing of actual prejudice, which is the key factor.

It is this concept of possible prejudice that underlies the rules, *supra,* which provides for re-assignment on retrial. Such rules are consistent with the rationale of *Gregg*.

The very essence of the *Gregg* decision was that a trial judge's impartiality can be reasonably questioned after he reads a presentence report. This indeed appears to have been the purpose of Federal Rule of Criminal Procedure 32, which bars submission of that report before verdict. It is true that there is a conflict in authorities (both case law and local rules) on whether *Gregg* demands mandatory recusal for a second trial, but the cases which have held that recusal is not mandatory focus on the letter of *Gregg* (the technical requirements of Rule 32) rather than the clear spirit of that decision (that there is a risk of the trial judge's partiality once he reads the presentence report). Section 455(a) does not deal with the subjective impressions of the trial judge nor attempt to reach into the actual impact or events in causing real bias or prejudice. Rather, that section looks to an objective standard. As a matter of objective standards, it cannot be seriously disputed that *Gregg* puts presentence reports in a special category and finds that exposure to such reports raises serious questions about the trial judge's ensuing impartiality in a case. We submit that the Court's observations in *Gregg* about presentence reports and possible post-exposure partially constitute, as a matter of law, a "reasonable factual basis for doubting the judge's impartiality" under §455(a).

In the present case, the lower court (Appendix B) placed great weight on the concept that §455(a) should not be deemed to apply to "judicially acquired" information. A presentence report and attendant communications with the court probation officer may

not be viewed as purely "judicially acquired" information. Were presentence reports properly viewed as falling into the same category as information acquired during bail hearings, suppression hearings, etc., there would have been no need for Rule 32(c) nor the unequivocal language of this Court in *Gregg*, or even for that matter the "balance test" used in the Third Circuit. No such balancing would be required if presentence reports fell into the general category of information learned about a defendant in the course of judicial proceedings.

Petitioner submits that the risk of prejuduce—however subtle—that underlies Rule 32(c) should be equally applicable, and have the same implications, where a second trial is to be conducted before the trial judge. The Seventh Circuit approach is the proper one and petitioner urges this Court to grant certiorari to consider this important question of federal law as to which there currently exists divergent approaches in the lower courts.

II.

Assuming *arguendo* that the "balancing test" is the proper approach, the trial judge in this multi-judge district should have recused himself from petitioner's trial on a new indictment where no sound reason of judicial administration disfavored reassignment to another judge.

Alternatively, petitioner argues that even if a balancing test is the proper approach there exists in this record no persuasive reasons grounded in proper judicial administration that disfavored reassignment to another judge. There were many other judges available to hear the case; it had been assigned to Judge Broderick purely by chance; petitioner's motion was timely filed.

The trial judge found that the burdens of a transfer to another judge "would not be insubstantial" (Appendix B). The trial judge

notes that a transfer (1) would delay the proceedings; (2) there were co-defendants on the indictment; (3) the trial court had already ruled on some other pretrial motions and had taken guilty pleas from several other defendants; (4) the trial judge had become generally acquainted with the indictment (Appendix B).

It is true that some delay would have been occasioned by transfer but Congress has explicitly made excludable from the Speedy Trial Act delay resulting from pretrial motions, 18 U.S.C. §3161(h)(F), and the present motion was timely filed. The disposition of other pretrial motions and the entry of guilty pleas by other defendants would not seem to be a reason militating against transfer since transfer would not have implicated any duplication of this work. The fact that these motions were disposed of, and the pleas taken, by the original trial judge, rather than the judge to whom the case would be transferred, would not seem to be particularly significant as a matter of judicial administration. Lastly, the trial court's familiarity with the five count indictment is a legitimate factor, but not a weighty one, given the conventional brief description of the charges.

Petitioner does not dispute that substantial deference must be given to the trial judge's evaluation of these factors but contends that the trial court viewed these factors against a backdrop of requiring petitioner to prove actual prejudice and that the balancing process was too heavily dependent upon petitioner being able to reach into the trial judge's mind and his current attitude towards petitioner.

Absent more convincing reasons grounded in legitimate judicial administration concerns, a criminal defendant should not have to be judged a second time by a trial judge who has been exposed to a presentence report and sentenced the defendant to prison.

Petitioner urges a grant of certiorari on this issue on the ground that an important issue of federal law is presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

JOHN ROGERS CARROLL
THOMAS COLAS CARROLL

CARROLL & CARROLL
Attorneys for Petitioner

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS, APRIL 6, 1984, AFFIRMING JUDGMENT OF CONVICTION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1708

UNITED STATES OF AMERICA,

vs.

FREZZO, GUIDO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 83-00029-1)
District Judge: Hon. Raymond J. Broderick

Submitted Under Third Circuit Rule 12(6)
April 5, 1984
Before: GIBBONS and SLOVITER, *Circuit Judges,* and MENCER, *District Judge**

(OPINION FILED: April 6, 1984)

MEMORANDUM OPINION OF THE COURT

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* Hon. Glenn R. Mencer, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Appendix A

GIBBONS, *Circuit Judge:*

Guido Frezzo appeals from a judgment of sentence imposed following his conviction of violating 18 U.S.C. § 371 (1982) by conspiring to transport stolen goods in interstate commerce in violation of 18 U.S.C. §2314 (1982) and to receive such goods in violation of 18 U.S.C. §2315 (1982) by receiving the same goods. The goods in question are paintings owned by Andrew Wyeth, stolen from his home in Pennsylvania, transported to Delaware, and returned to Frezzo's office in Pennsylvania.

Frezzo contends that the court erred in denying his motion for a judgment of acquittal on the conspiracy charge because the evidence established as a matter of law that he was a mere purchaser, not a conspirator. *See United States v. Solomon,* 686 F.2d 863, 876-77 (11th Cir. 1982); *United States v. Ford,* 324 F.2d 950, 952 (7th Cir. 1963). There is evidence from which the jury could have found that although Frezzo did not conspire to steal the paintings, he associated with others in a conspiracy to transport them and retain them while the conspirators looked for purchasers. This includes evidence of Frezzo's advice to one conspirator to "keep the paintings stored and keep LaCorte's mouth shut," evidence of inquiries about the statute of limitations or prosecution for theft of the paintings, and evidence of a possible attempt to prevent disclosure. Clearly a jury issue was presented.

Frezzo also contends that the court erred in instructing the jury that it could "infer a conspiracy from an on-going relationship in furtherance of an unlawful purpose, or from the defendants' intention to aid in the larger scheme that is charged." App. at 841. His objection to this charge is predicated on his view that the evidence shows no more than a seller-purchaser relationship. As noted above, there is evidence of a conspiratorial relationship. The charge is on this record correct.

Appendix A

Frezzo contends further that his motion for judgment of acquittal on the 18 U.S.C. §2315 charge should have been granted because there is no evidence that the paintings were still moving in interstate commerce when he received them. *See United States v. Thies,* 569 F.2d 1268, 1272-73 (3d Cir. 1978). There is ample evidence from which the jury could conclude that when Frezzo received the paintings they had been returned to Pennsylvania for purposes of sale by a fence. Clearly a jury issue was presented.

Frezzo also contends that the court's charge on movement in interstate commerce with respect to 18 U.S.C. § 2315 was erroneous. We have reviewed it in light of the record and conclude that it was correct. The court charged that the interstate character of stolen goods continues during the time the goods are held for sale. As noted in the preceding paragraph, there was evidence from which retention for resale could be found.

Finally, Frezzo contends that he is entitled to a new trial because the trial court should have granted his recusal motion. That motion was predicated on the fact that the trial judge sentenced him on a prior offense, and thus saw a presentence investigation report prior to this trial. *See* Fed. R. Crim. P. 32(c); *Gregg v. United States,* 394 U.S. 489 (1969). In deciding the motion the trial court properly balanced competing considerations as required by *United States v. Small,* 472 F.2d 818, 821-22 (3d Cir. 1972). We find no abuse of discretion, particularly in light of the fact that Frezzo points to no prejudice resulting from the trial judge's exposure to the presentence investigation report prior to trial.

The judgment appealed from will be affirmed.

Appendix A

TO THE CLERK OF THE COURT

Please file the foregoing opinion.

_____

Circuit Judge

APPENDIX B — MEMORANDUM OPINION OF TRIAL COURT DATED MAY 5, 1983, *UNITED STATES V. FREZZO*, 563 F. SUPP. 592 (E.D. PA. 1983)

UNITED STATES of America

v.

Guido FREZZO.

Crim. No. 83-00029-1.

United States District Court, E.D. Pennsylvania.

May 5, 1983.

Defendant charged with conspiracy and receiving stolen property moved for trial judge to recuse himself. The District Court, Raymond J. Broderick, J., held that appearance of judicial bias as claimed by defendant, based solely on fact that judge presided over previous criminal trial, did not require recusal.

Motion denied.

Appearance of judicial bias as claimed by defendant, based solely on fact that judge presided over his previous criminal trial did not require recusal. 28 U.S.C.A. §455(a).

Peter F. Vaira, U.S. Atty., Walter S. Batty, Asst. U.S. Atty., Philadelphia, Pa., for plaintiff.

Thomas Colas Carroll, Philadelphia, Pa., for defendant.

RAYMOND J. BRODERICK, District Judge.

Appendix B

Defendant Guido Frezzo has moved this Judge to recuse himself from presiding over Frezzo's impending criminal jury trial in which he is charged with conspiracy and receiving stolen property. Defendant contends that this Judge's impartiality in the present case may reasonably be questioned since this Judge presided over a previous criminal jury trial of the defendant, which resulted in his conviction for violating the Federal Water Pollution Act. Prior to this Judge's sentencing of Mr. Frezzo on December 6, 1978, this Judge reviewed a presentence report and recommendation prepared by the probation office. Defendant was fined and sentenced to a 30-day period of incarceration. The defendant also contends that this Judge's exposure to adverse information about him, presented by the Government in opposition to his motion to reduce the sentence, creates an appearance of bias, so does the protracted nature of the post-trial proceedings in the prior case.[1] Consequently, defendant contends that this Judge must recuse himself pursuant to 28 U.S.C. §455(a) which requires a judge of the United States to recuse himself "in any proceeding in which his impartiality might reasonably be questioned."

We should state at the outset that defendant has not pointed to any extrajudicial conduct of this Judge in support of his motion for recusal. Nor indeed has defendant called this Judge's attention to any material in either the presentence report or in the proceedings subsequent to his prior conviction which could bias

1. Defendant's conviction was affirmed on direct appeal, 602 F.2d 1123 (3d Cir.1979), and *certiorari denied* 444 U.S. 1074, 100 S.Ct. 1020, 67 L.Ed.2d 756 (1980). Defendant then sought collateral relief, which was denied, 491 F.Supp. 1339 (E.D.Pa.1980). This denial was reversed and remanded for further proceedings, 642 F.2d 59 (3d Cir.1981). On remand, this Court again denied relief, 546 F.Supp. 713 (Pa.1982), and this denial was affirmed 703 F.2d 62 (3d Cir. 1983).

or prejudice this Judge. The Court does not recall any such information. Defendant also does not claim that any of this Judge's rulings or actions in the prior proceedings were the result of bias or prejudice, nor does defendant point to anything in those proceedings which could support a contention that this Judge has prejudged or will prejudge anything of issue in the current proceedings. The appearance of bias as claimed by the defendant is based solely upon the fact that this Judge, more than four years ago, reviewed a presentence report prior to the imposition of sentence upon defendant and presided over post-trial proceedings. This Judge has considered the contentions of the defendant, and the Government's response, and has also independently considered whether its recusal is warranted or desirable in the interests of justice. For the reasons stated below, we have determined that this Judge's impartiality cannot reasonably be questioned in this case, and that this Judge's review of the presentence report does not warrant recusal. Defendant's motion to recuse will therefore be denied.

Although defendant has chosen to base his motion on 28 U.S.C. §455(a), the Court does not believe that this section is applicable, since defendant has not alleged bias or prejudice resulting from any extrajudicial source. *See* p. 597, infra. Defendant has also, however, argued that the principles enunciated in *Gregg v. United States,* 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969), as interpreted by the Third Circuit in *United States v. Small,* 472 F.2d 818 (3d Cir. 1972), require recusal. *Gregg* and *Small* were both based on the prohibition, contained in Rule 32 of the Federal Rules of Criminal Procedure, of premature disclosure of presentence reports. Since the Court believes that *Gregg* and *Small* and their progeny provide the proper frame of reference for consideration of defendant's motion to recuse, we will begin with a discussion of the principles of these cases.

Appendix B

In contending that recusal is required in this case, defendant places primary reliance on this Court's viewing of a presentence report concerning the defendant prior to sentencing him in December, 1978. Defendant does not contend that anything about the Court's review of the presentence report was improper or in violation of Fed. R.Crim.P. 32. Defendant contends, however, that the reasoning of dicta in *Gregg v. United States,* supports recusal in the present case. In *Gregg* the Supreme Court stated that submission of a presentence report to the Court before a defendant pleads guilty or is convicted, in violation of Rule 32, "constitutes error of the clearest kind." 394 U.S. at 491-92, 89 S.Ct. at 1136. Since a presentence report may contain prejudicial non-evidentiary material presented to the judge *ex parte,* the Supreme Court added, strict compliance with the terms of Rule 32 is necessary to prevent "the possibility of prejudice which Rule 32 intended to avoid." *Id.*

In *United States v. Small,* 472 F.2d 818 (3d Cir. 1972), the Third Circuit noted that the Supreme Court in *Gregg* was not considering circumstances, such as retrial, in which a judge would necessarily have seen a presentence report concerning the defendant before presiding over his trial. Nor, according to the Third Circuit, was the Supreme Court considering "other similar circumstances when a judge may see a presentence report on a defendant before proceeding to try him." 472 F.2d at 821. One such circumstance identified by the Third Circuit as not covered by *Gregg* was that in which a trial judge presides over the conviction of a defendant on one criminal offense, and sentences him, and shortly thereafter is assigned to try the same defendant on other charges. The Third Circuit suggested that in such a case the principles of *Gregg* require the trial judge to balance Rule 32's objective of preventing even the possibility of prejudice with the administrative convenience, simplicity of procedure and prevention of delay implicit in having

a single judge preside over a defendant's court appearances. 472 F.2d at 821-22. *See* Advisory Comm. Notes, 1974 Amendment (decision is discretionary with the trial judge). Considering the present case in light of this test as set forth in *Small,* the Court has determined that the balance of competing considerations weighs against recusal.

Any possibility of prejudice based upon a reading over four years ago of the defendant's presentence report, and the Court does not believe there is any, cannot be equated with the possibility of prejudice in the circumstances discussed by the Third Circuit in *Small.* Since this is not a retrial, there is no danger that the Court has learned facts from the prior proceeding involving the defendant regarding the current charges against him which might cause the Court to prejudge the issue of guilt. The Court could not, for example, have read in the presentence report any statement of the defendant's version of the events giving rise to the current charges, as might be true were this a retrial of the earlier case. In addition, over four years have elapsed since the defendant was sentenced following his conviction in the earlier trial. We do not think it reasonable to believe that the Court has retained any prejudicial information which might have been contained in the presentence report. In fact, as stated above, the Court cannot recall any adverse information that was presented about the defendant in the presentence report. This case involves fewer dangers of prejudice than does the situation identified by the Third Circuit in *Small* where the second trial of the defendant on unrelated charges occurs "shortly" after the first conviction and sentence. *See Small,* 472 F.2d at 821. While we have employed the balancing test suggested by *Small,* this may be more than even *Small* requires.

Finally, the Court takes note of the fact that it will not be sitting as a fact-finder in the impending trial; nor has the Court made any factual findings which bear any relationship to the issues in the current proceedings. These factors also weigh against recusal. *United States v. Robin,* 553 F.2d 8, 10 (2d Cir. 1977); *United States v. Seaccia,* 514 F.Supp. 1353, 1356-57 (N.D. N.Y. 1981); *United States v. Ferretti,* 508 F.Supp. 913, 916 (E.D.Pa.1981); *United States v. Meinster,* 488 F.Supp. 1342, 1348 (S.D.Fla.1980) *aff'd sub nom., United States v. Phillips,* 664 F.2d 971 (5th Cir.1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 2965, 73 L.Ed.2d 1354, ____ U.S. ____, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982). As the District Court stated in *Meinster:*

> During a criminal jury trial, this Court does not sit to determine the guilt or innocence of the defendants before it. That mission is the function of the jury. In contrast, the task of the Court is to answer those legal questions which arise during the course of the trial and to ensure that the trial is conducted in an orderly fashion which will protect the interests of all concerned: the defendants, the government and the community at large.

488 F.Supp. at 1348.

The Court also believes that the administrative and other burdens of a transfer of this case to another judge at this time would not be insubstantial. Although the case has not yet proceeded to trial on the merits, it is almost ready for trial, and a transfer could only serve to delay the proceedings. Further, the Court has already ruled on the severance motion of a co-defendant, has taken guilty pleas of three other co-defendants, and has had

rather extensive involvement in the questions raised as to the competency of one of these co-defendants. The Court has also gained familiarity with the five-count indictment handed down in this case. The Court canceled, therefore, accept defendant's contention that recusal in this case would involve the delay or duplication of effort.

In addition, administrative burdens are raised by the transfer itself, burdens which would be substantial for the court system as a whole if recusal were held to be justified on the basis of the allegations the defendant has made here. Severe burdens would be placed on the judicial system if a judge had to withdraw from a case whenever he or she had presided over proceedings in the same or a related case that provided non-evidentiary information about a defendant. *United States v. Cowden,* 545 F.2d 257, 265-66 (1st Cir.), *cert. denied,* 430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1976); *United States v. Archibald-Newball,* 554 F.2d 665, 682 (5th Cir.1977), *cert. denied,* 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1977). The reasoning supporting recusal in the present case could extend to require recusal where a judge heard evidence later suppressed, or presided over bail or probation revocation hearings. Such reassignment would impose unnecessary burdens, and could also, since recusal is often at the defendant's request, subvert the purpose of this Court's system of random assignment of judges to cases. *See Markus v. United States,* 545 F.Supp. 998, 1000 (S.D.N.Y.1982) (condemning "judge-shopping"); *United States v. Kelly,* 519 F.Supp. 1029 (D.Mass.1981). For all of the above reasons, the Court has determined that the balance of considerations in this case weighs in favor of denial of defendant's motion to recuse.

The Court's decision not to recuse itself in the present case is supported by the holdings, and the reasoning, of virtually every

case which has considered the question of recusal in similar circumstances. At least two courts have stated flatly that information contained in presentence reports properly brought to a judge's attention during the performance of his duties is not a basis for disqualifying the judge. *United States v. Clark,* 605 F.2d 939, 940-41 (5th Cir. 1979); *United States v. Montecalvo,* 545 F.2d 684, 685 (9th Cir.1976), *cert. denied,* 431 U.S. 918, 97 S.Ct. 2184, 53 L.Ed.2d 229 (1977). As the Court in *Clark* stated, quoting *Smith v. United States,* 360 F.2d 590, 592 (5th Cir.1966), the suggestion that disqualification is proper because a judge has viewed a presentence report is "highly untenable in light of the decisions that a trial judge, who is familiar with the defendant's background by reason of having tried him in previous cases, is not thereby disqualified to try the same defendant in subsequent cases." 605 F.2d at 941. Courts have also explicitly held that where a judge is faced with a trial of a defendant whose presentence report he has read in a prior case refusal to recuse is proper. *United States v. Harris,* 542 F.2d 1283, 1303-04 (7th Cir. 1976); *United States v. Foddrell,* 523 F.2d 86, 87 (2d Cir.1975), *cert. denied,* 423 U.S. 950, 96 S.Ct. 370, 46 L.Ed.2d 286 (1976). A number of cases have also considered further proceedings in the same trial after a presentence report has been reviewed, without violation of Fed.R.Crim.P. 32, and have concluded that recusal was not required. *See United States v. Clark,* 605 F.2d at 942 (withdrawn guilty plea); *United States v. Sonderup,* 639 F.2d 294 (5th Cir.1981), *cert. denied,* 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 426 (1981), 453 U.S. 928, 102 S.Ct. 892, 69 L.Ed.2d 1024 (1981) (same); *United States v. Montecalvo,* 545 F.2d at 685 (same); *United States v. Lyon,* 588 F.2d 581, 582-83 (8th Cir.1978), *cert. denied,* 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 381 (1979) (same, demonstrable prejudice must be shown); *United States v. Bourque,* 541 F.2d 290, 296 (1st Cir.1976) (same, demonstrable prejudice must be shown); *United States v. Hill,* 550 F.Supp. 983, 986 n.

6 (E.D.Pa.1982) (retrial); *United States v. Ferretti,* 508 F.Supp. 913 (E.D.Pa.1981) (retrial); *United States v. Sepulveda,* 512 F.Supp. 592 (E.D.Tenn.1981) (retrial); *United States v. Scaccia,* 514 F.Supp. at 1355-56 (prior trial, judge also presided at probation revocation proceeding); *But see United States v. LeFrere,* 553 F.Supp. 133 (C.D.Ill.1982) (rejected plea agreement; court exercises discretion to recuse). Finally, several cases, while not specifically discussing the problem of presentence reports, have held that prior judicial exposure to a defendant does not constitute grounds for recusal. *United States v. Jackson,* 627 F.2d 1198, 1207 n. 20 (D.C.Cir.1980); *United States v. Vasquez,* 638 F.2d 507, 523 n. 8 (2d Cir. 1980), *cert. denied,* 450 U.S. 970, 101 S.Ct. 1490, 67 L.Ed.2d 620 (1981) (contention that judge should have disqualified himself because defendant had previously been convicted before same judge held "meritless"); *United States v. Wolfson,* 558 F.2d 59 (2d Cir.1977) (judge sat at two previous trials of defendant ending in convictions); *King v. Warden,* 551 F.2d 996 (5th Cir.1977); *Barnes v. United States,* 241 F.2d 252, 254 (9th Cir.1956) ("Because a judge has decided one case against a litigant is no reason why he cannot sit in another"); *See also Mitchell v. Fiore,* 470 F.2d 1149 (3d Cir.1972), *cert. denied,* 411 U.S. 938, 93 S.Ct. 1899, 36 L.Ed.2d 399 (1973) (proper for judge to preside over contempt proceedings even though he presided over earlier trials); *United States v. Boffa,* 513 F.Supp. 505 (D.Del.1981) (no recusal where trial judge sat on unrelated case and found defendant's testimony not credible).

Defendant has also contended that since the reading of a presentence report itself raises the appearance of impropriety according to the Supreme Court's discussion in *Gregg,* recusal is required in this case by 28 U.S.C. §455(a) regardless of any determination we might make by applying the balancing test of *Small.* Defendant contends that the enactment of the present

§455(a) in 1974 has undercut the validity of the *Small* test. A holding consistent with defendant's contention would require recusal in every case in which a presentence report concerning the defendant, whether in a prior proceeding or the present proceeding, had been read. This would be inconsistent with every case cited above in which it was held proper for a judge to conduct further proceedings after having read a presentence report concerning the defendant. In making his contention, defendant has read too much into the *Gregg* opinion. *Gregg* did not state that an appearance of bias is raised every time a judge reads a presentence report; it stated that error is committed when a presentence report is read in violation of Rule 32, and that the purpose of Rule 32 is to avoid even the possibility of prejudice.

Further, in contending that the enactment of §455(a) has rendered the *Small* analysis obsolete, defendant has read the *Small* opinion for less than it is worth. It is true, as defendant asserts, that §455(a) is designed to prevent the objection appearance of bias, as well as bias-in-fact. *United States v. Nobel,* 696 F.2d 231, 235 (3d Cir. 1982). The test is whether there is a reasonable factual basis for doubting the judge's impartiality. *Id.* As heretofore noted, however, the *Small* balancing test was designed not merely to prevent actual, demonstrable prejudice, but to prevent "even the possibility of prejudice." 472 F.2d at 821-22. Defendant's apparent contention that the *Small* test does not provide the protection against the appearance of partiality contemplated by §455(a) is thus untenable.

Further, it is quite doubtful that §455(a) was intended to apply to conduct within a judicial context, and there is no support for the contention that it is applicable to the conduct upon which defendant here bases his recusal motion. Most courts which have considered §455(a) have held that the determination whether a

judge's impartiality might reasonably be questioned is to be made solely on the basis of conduct extrajudicial in nature. *Davis v. Board of School Commissioners of Mobile Cty.*, 517 F.2d 1044, 1052 (5th Cir.), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *United States v. Boffa*, 513 F.Supp. at 509-10; *United States v. Sepulveda*, 512 F.Supp. at 595; *Markus v. United States*, 545 F.Supp. at 999; *United States v. Cerrella*, 529 F.Supp. 1373, 1376 (S.D.Fla.1982); *United States v. Kelly*, 519 F.Supp. 1029, 1038 & n. 24 (D.Mass.1981). Another Court's position on this question is unclear. *Compare United States v. Coven*, 662 F.2d 162, 168 (2d Cir.1981) (fact that allegedly prejudicial information is learned in a judicial rather than a personal capacity is "relevant" to the analysis of the appearance of impropriety); *with In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir.1980) ("We conclude that under section 455(a) the bias to be established must be extrajudicial and not based upon in-court rulings.") The Third Circuit has approved the *Davis* holding, and stated that "[i]nsofar as the policy behind §455 is concerned with matters of potential influence which exist 'outside the courtroom' we agree that the primary inquiry ought to be into extra-judicial conduct." *Mayberry v. Maroney*, 558 F.2d 1159, 1162 n. 16 (1977). Even where conduct in a judicial context is considered, however, it will serve to disqualify only in "exceptional circumstances," where the conduct reflects pervasive bias and prejudice. *United States v. Phillips*, 664 F.2d at 1000-1004; *United States v. Scaccia*, 514 F.Supp. at 1356. No such circumstances exist in the present case.

In several cases in which defendants have argued recusal was necessary because of the judge's review of a presentence report, the argument for recusal has been based not only on *Gregg* and its progeny, but also on §455. In all of these cases, §455 has been held not to require recusal. *United States v. Clark*, 605 F.2d at

940-41; *United States v. Sonderup,* 639 F.2d at 296; *United States v. Lyon,* 588 F.2d at 582-83. *See United States v. Cowden,* 545 F.2d at 265-66; *United States v. Coven,* 662 F.2d at 168. For all the above reasons, this Court has determined it is not required to recuse itself pursuant to §455(a).

The Court's conclusion that its review of the presentence report does not counsel recusal applies *a fortiori* to the other contentions raised by the defendant. Any adverse information which might have been presented to the Court in the government's brief in opposition to defendant's Rule 35 motion, and the Court does not recall if there was any, or what it was, would have been learned in a judicial context, and there has been absolutely no showing that it in any way provides a basis for inferring the kind of bias and prejudice necessary for a recusal under such circumstances. Similarly, although the defendant has referred to the length of the proceedings for collateral relief in this case, defendant has not pointed to a single ruling or other circumstance regarding these proceedings that would either raise the inference of bias or serve to create bias, nor is the Court aware of any. The post-conviction proceedings involved questions of the interpretation of the statute and regulations under which defendant was convicted; they did not involve any consideration by this Court of the character of the defendant or of any facts which might be relevant to the current case against him. Moreover, the Court's denial of relief was ultimately affirmed on appeal. There is thus no factual basis to create an objective appearance or possibility of partiality.

For all of the above reasons, defendant's motion to recuse will be denied.